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No. 91-714

In the Supreme Court of the United States

OCTOBER TERM, 1991

PUGET SOUND POWER & LIGHT COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioner's appeal from an uncertified interlocutory transfer order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a, 8a) is unreported, but the decision is noted at 942 F.2d 912 (Table). The opinion of the United States Claims Court (Pet. App. 9a-52a) is reported at 23 Cl. Ct. 46.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1991. The opinion was amended on September 4, 1991, and a revised mandate issued on October 2, 1991 (Pet. App. 8a). The petition for a writ of certiorari was filed on October 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the appealability under the collateral order doctrine of an interlocutory transfer order of the Claims Court. The court determined that it lacked jurisdiction over an action and transferred it to the United States Court of Appeals for the Ninth Circuit, the court in which the Claims Court determined jurisdiction would lie.

The underlying dispute in this case involves certain administrative actions of the Bonneville Power Administration (BPA), an agency within the Department of Energy. BPA markets power from 30 federal hydroelectric projects and two nuclear power plants in the Pacific Northwest; these projects and plants are known collectively as the Federal Columbia River Power System. In some circumstances, BPA sells power outside the Pacific Northwest region.

BPA's functions as a federal power marketing agency are largely governed by the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697, which is known as Northwest Power Act or Regional Act and is codified at 16 U.S.C. 839-839h. See *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 383-386 (1984).[1] As pertinent here, the Northwest Power Act authorizes the Administrator of BPA to sell "power * * * that is surplus to his obligations" under other provisions. 16 U.S.C. 839c(f). That authority must be exercised "in accordance with this and other Acts applicable to the Administrator, including * * * the Act of August 31,

[1] In addition to the Northwest Power Act, there are other statutes applicable to BPA's functions and operations, which, other than the Regional Preference Act, are not relevant to this petition for certiorari.

1964 (16 U.S.C. 837-837h)." 16 U.S.C. 839c(f). Another provision requires that all BPA contracts "for the sale or exchange of electric power for use outside the Pacific Northwest * * * shall be subject to limitations and conditions corresponding to those provided in sections 2 and 3 of the Act of August 31, 1964 (16 U.S.C. 837a and 837b)." 16 U.S.C. 839f(c). The Act of Aug. 31, 1964, Pub. L. No. 88-552, 78 Stat. 756 (16 U.S.C. 837-837h), which is commonly referred to as the Regional Preference Act, also applies (in conjunction with the Northwest Power Act) to BPA's power sales outside the Pacific Northwest region.

Under the Northwest Power Act, BPA "sales, exchanges, and purchases of electric power" are deemed to be administrative "final actions" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701-706. 16 U.S.C. 839f(e). Relatedly, all "[s]uits to challenge [such] final actions * * * or the implementation of such final actions" are within the exclusive jurisdiction of the United States Court of Appeals for the Ninth Circuit. 16 U.S.C. 839f (e)(5).

In 1981, pursuant to the Northwest Power Act, BPA offered initial power sales contracts to its regional customers. 16 U.S.C. 839c(g)(1). Numerous BPA utility customers, including petitioner Puget Sound Power & Light Company, executed power sales contracts offered pursuant to this provision. See *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, *supra*. Appended to these and other subsequent BPA power sales contracts were generic "General Contract Provisions" that incorporated by reference the provisions of the Regional Preference Act and Sections 839f(c) and 839f(d) of the Northwest Power Act.

2. On March 1, 1990, approximately one week after BPA had initiated an administrative rulemaking proceeding that was intended to develop a formal policy governing BPA's extra-regional power sales, see 55 Fed. Reg. 6420 (1990),[2] petitioner filed the present case in the United States Claims Court. Petitioner's complaint contended that BPA breached contracts with it by marketing power outside of the Pacific Northwest region in contravention of the Northwest Power Act, 16 U.S.C. 839f(c), and the Regional Preference Act, 16 U.S.C. 837-837h. Petitioner sought money damages based upon the agency's purported violation of the two statutes, as well as declaratory relief "that BPA may not in the future sell or exchange power in violation of the Regional Preference Provisions of its contracts with Puget Power." Pet. App. 56a-60a.

The government moved to dismiss the complaint for lack of jurisdiction. The Claims Court agreed with the government that petitioner's claims constituted a "challenge[] [to] final agency action" as set forth in the Northwest Power Act. Pet. App. 51a. The Claims Court explained that the statute provides an exclusive forum in the Ninth Circuit for petitioner's claims, and preempts any more general statutory remedy that might otherwise have been available under the Tucker Act, 28 U.S.C. 1491. Pet. App. 30a-34a, 48a-52a. Thus, the Claims Court concluded

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[2] This rulemaking proceeding, which was initiated on February 23, 1990, was intended to review BPA's historical practices regarding extra-regional power sales, and to develop a formal policy governing those sales. See 55 Fed. Reg. 6420 (1990). Subsequently, BPA published a notice establishing the scope of issues to be addressed in the proceeding, see 56 Fed. Reg. 40,881 (1991), which remains pending today.

> [a]ny inquiry into the merits of this challenge will require a review of agency administrative actions involving the extraregional sales of power and the implementation procedures associated with these sales. * * * Challenges to final actions, or implementations of final actions, taken by BPA are to be exclusively reviewed by the United States Court of Appeals for the Ninth Circuit as specified in section 9(e) of the Northwest Power Act, 16 U.S.C. 839f(e)(5).

Id. at 51a-52a. In lieu of dismissal, however, the Claims Court ordered transfer of the proceeding to the Ninth Circuit pursuant to 28 U.S.C. 1631.

3. Petitioner appealed the Claims Court's order to the United States Court of Appeals for the Federal Circuit. The government filed a motion to dismiss on the ground the appeal sought review of a nonappealable, uncertified, interlocutory order, and therefore did not come within the Federal Circuit's jurisdiction. See 28 U.S.C. 1292(d)(2). The court of appeals agreed, and dismissed the appeal. Pet. App. 1a-4a, 8a. The court of appeals rejected petitioner's argument that review was proper under the collateral order doctrine, finding that the Claims Court's order was effectively reviewable in the transferee court. *Ibid.*

ARGUMENT

The court of appeals' conclusion that the collateral order doctrine is inapplicable is consistent with the decisions of this Court, and, subject to one arguable exception, with those of the other courts of appeals that have considered the issue. Review by this Court is therefore unwarranted.

1. It is fundamental that because interlocutory orders do not satisfy the statutory requirement of finality, they generally are not appealable prior to final judgment. *E.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). The collateral order doctrine, which is an exception to this general rule, permits immediate appeal of a limited class of interlocutory orders. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Stringfellow* v. *Concerned Neighbors In Action*, 480 U.S. 370, 375 (1987). The only issue in this case is whether the Claims Court's order transferring the case to the Ninth Circuit is "effectively unreviewable on appeal." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).[3]

This Court has determined that an interlocutory order meets this stringent test only "where denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 376 (1981), quoting *United States* v.

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[3] *Coopers & Lybrand*, 437 U.S. at 468, described the three factors that must be present in order for an interlocutory order to be appealable under the collateral order doctrine: Such an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." The court of appeals addressed only the third factor, apparently assuming that the first two were satisfied. Pet. App. 2a-3a.

Ryan, 402 U.S. 530, 533 (1971); accord *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495 (1989). The relevant inquiry focuses on whether review at any point will be available, not on the practical effects on the litigation of the interlocutory order. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (no collateral order review of order decertifying a plaintiff class, which had the effect of ensuring that the underlying litigation would be dropped); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) (no collateral order review of order denying a motion to disqualify counsel).

The court of appeals recognized the stringency of the test set forth by this Court, Pet. App. 3a, and correctly concluded that effective review of the Claims Court's order is available in the Ninth Circuit. The transfer order in this case is not effectively unreviewable because "[t]he Ninth Circuit may examine whether it has jurisdiction over the case, sua sponte, or by a motion to dismiss. In addition, Puget Sound may obtain review of the jurisdictional issue by moving the Ninth Circuit, the transferee court, to retransfer the case to the Claims Court." Pet. App. 4a. In fact, petitioner currently has pending in the Ninth Circuit a motion to retransfer this case to the Claims Court. The arguments raised by petitioner in that motion are identical to those previously presented to the Claims Court.[4] The Ninth Circuit's consideration

[4] Petitioner complains that the transferee court in this case is an appellate court, rather than a trial court. That circumstance works to petitioner's advantage, however, in that petitioner is thus able in effect to gain relatively immediate appellate treatment of the jurisdictional issue. If, on the other hand, the Ninth Circuit agrees that it has exclusive jurisdiction over petitioner's claims, review in the Ninth Circuit is all to which petitioner was entitled in any event. See *Pacific*

of petitioner's retransfer motion will provide effective review of the jurisdictional issue for purposes of the collateral order doctrine.[5]

2. Petitioner claims that the courts of appeals have adopted conflicting positions on the appealability of transfer orders under Section 1631. The asserted conflict does not, however, indicate any difference in approach among the courts of appeals. The differing results in the cases to which petitioner points are the product of the fact-specific determinations regarding whether all review was effectively foreclosed by the transfer orders in those cases.

Power & Light Co. v. *Bonneville Power Administration*, 795 F.2d 810, 816 (9th Cir. 1986) (holding that the substance of a claim against BPA, rather than the label attached to it by the claimant, determines the proper forum for deciding the claim).

[5] Review may be impossible, for example, when a district court dismisses a party, stripping the district court of diversity jurisdiction and leaving the adversely-affected party with no potential for review whatsoever. See *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). Contrary to petitioner's contention (Pet. 19-21), that is not the situation in this case. Unlike in *Waco*, the trial court here did not pass on the substance of petitioner's claims, but merely identified the nature of those claims for purposes of determining subject-matter jurisdiction. Petitioner further claims (*ibid.*) that, as was the case in Waco, the Claims Court's decision to "dismiss" for lack of jurisdiction at the same time it decided to transfer the case to the Ninth Circuit makes the order final and appealable. Putting aside the fact that the *Waco* court remanded to state court after dismissing the only diverse party (on substantive grounds), petitioner's contention proves too much. Every Section 1631 transfer by definition requires the transferring court to conclude that it lacks jurisdiction; it is, however, "established that a transfer order is interlocutory and generally not appealable under the collateral order doctrine." Pet. App. 3a.

As petitioner notes (Pet. 10), three circuits have held that transfer orders under Section 1631 generally are not subject to immediate appeal under the collateral order doctrine. See, *e.g.*, *Persyn* v. *United States*, 935 F.2d 69, 72-73 (5th Cir. 1991); *Alimenta (USA), Inc.* v. *Lyng*, 872 F.2d 382, 384-85 (11th Cir. 1989); *Raines* v. *Block*, 798 F.2d 377, 379 (10th Cir. 1986). In each of these cases, the courts held that effective review after the transfer was available.

Petitioner contends that this line of cases is in conflict with a competing line, under which Section 1631 transfer orders come within the collateral order doctrine. See *Foster* v. *Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.), cert. denied, 112 S. Ct. 302 (1991); *Gower* v. *Lehman*, 799 F.2d 925 (4th Cir. 1986); *McLaughlin* v. *Arco Polymers, Inc.*, 721 F.2d 426 (3d Cir. 1983); *Goble* v. *Marsh*, 684 F.2d 12 (D.C. Cir. 1982); *Untalan* v. *Calvo*, 381 F.2d 228 (9th Cir. 1967). Contrary to petitioner's assertion, these cases fall short of demonstrating a conflict in authority warranting this Court's review.

In *Foster* v. *Chesapeake Ins. Co.*, *supra*, and *McLaughlin* v. *Arco Polymers, Inc.*, *supra*, the transfer orders at issue were from federal district courts to *state* courts, and the Third Circuit held that they were immediately appealable because no further review within the federal court system of any kind was available. Similarly, the transfer order in *Untalan* v. *Calvo*, *supra*, was from a federal district court to the Island Court of Guam; in that situation further review of any sort within the federal court system was impossible. Finally, *Goble* v. *Marsh*, *supra*, was a case in which there was concurrent jurisdiction in the district court and the Court of Claims, and jurisdiction in the transferee court (the Court of Claims) was proper whether or not the transfer order was in

error; thus, absent interlocutory review the transfer order would have escaped any review because any error would have been harmless.[6]

Thus, the conflict in authority on which petitioner relies is more apparent than real. The differing results to which petitioner points are the consequence of different courts applying the established standard to particular factual circumstances; in some instances, all further review was foreclosed and the collateral order doctrine was applicable, and in others it was not.

We acknowledge, however, that the Fourth Circuit's decision in *Gower* v. *Lehman*, 799 F.2d 925 (1986), is out of step with the weight of authority. In *Gower*, the court of appeals held that an order under Section 1631 transferring an action from district court to the Claims Court was immediately appealable under the collateral order doctrine because it was otherwise effectively shielded from review. The *Gower* court simply stated its conclusion without considering whether effective review might be available through a motion to dismiss, or a motion to retransfer the action to the district court. *Gower* has been questioned on these grounds. See *Persyn*, 935 F.2d at 73. Moreover, the only judicial authority relied upon by *Gower* for the proposition that a Section 1631 transfer order is effectively unreviewable was the D.C. Circuit's decision in *Goble*, which as we have noted is distinguishable (and has been repeatedly distinguished) on the ground that in that case review on

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[6] Courts that have held, based on the facts presented by particular cases, that Section 1631 orders were not subject to interlocutory appeal have repeatedly distinguished *Goble* on this basis. See *Persyn*, 935 F.2d at 73; *Alimenta*, 872 F.2d at 384; *Raines*, 798 F.2d at 379; *Jesko* v. *United States*, 713 F.2d 565, 568 (10th Cir. 1983).

appeal from the transferee court would have been ineffective because any error in transferring the action was inconsequential. Nor, to our knowledge, has any court—including the Fourth Circuit—followed *Gower* in a subsequent case.[7] In view of the failure of *Gower*'s erroneous analysis to generate a recurring conflict among the circuits, there is no need for this Court to grant review in this case to address the minor deviation in authority represented by that case.

3. Nor is review needed to resolve an important or recurring question. As petitioner notes (Pet. 10-14), transfer orders are common. It does not follow, however, that the issue of whether uncertified transfer orders are subject to immediate interlocutory appeal is a recurring question for purposes of evaluating the need for this Court to exercise its discretionary jurisdiction. All that is at stake in this case is the reviewability of a transfer order from the Claims Court. While petitioner asserts that such orders are common (Pet. 12-13 nn.4, 5), petitioner points to nothing that indicates either that the Claims Court commonly errs in ordering such transfers, or, more importantly, that parties are ever denied effective review of such orders.

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[7] We are unaware of any Fourth Circuit decisions subsequent to *Gower* considering the appealability of a Section 1631 transfer order. In *In re International Precious Metals Corp.*, 917 F.2d 792 (4th Cir. 1990), the court denied a petition for a writ of mandamus seeking to direct a transfer; in a criminal case, *United States* v. *Blackwell*, 900 F.2d 742, 746-747 (1990), the Fourth Circuit declined to exercise collateral order jurisdiction to review the district court's refusal to retransfer the proceeding. Although both cases involved somewhat different issues than were presented in *Gower*, it is worth noting that neither even cited *Gower*.

Moreover, Congress has specifically addressed the converse of the question presented here, *i.e.*, the circumstances in which interlocutory review of orders transferring cases *to* the Claims Court may be obtained. 28 U.S.C. 1292(d)(4)(A). Petitioner argues (Pet. 16-19) that the enactment of Section 1292(d)(4)(A) supports the conclusion that transfer orders *from* the Claims Court are amenable to interlocutory review. As the court of appeals correctly concluded (Pet. App. 3a), however, if anything may be inferred from the enactment of Section 1292(d)(4)(A), it is the opposite of what petitioner urges. Where Congress intends for a litigant to be able to obtain an interlocutory appeal of a transfer order, Section 1292(d)(4)(A) demonstrates that it knows how to provide expressly for that review. See also 28 U.S.C. 1292(a)(1)-(3) and (c)(1)-(2). It has not done so here.

Contrary to petitioner's suggestion (Pet. 13), there is no realistic specter of "jurisdictional ping pong" presented here. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988). In *Colt Industries* the Court held that an initial transfer decision should be viewed as the law of the case by the transferee court, which allows such a case to proceed promptly in the transferee court. Absent a finding by the transferee court that the transfer order was not plausible or clearly erroneous, it should not retransfer such a case. *Id.* at 815-819. Petitioner urges that the Ninth Circuit and the Claims Court may engage in jurisdictional "ping pong," with each repeatedly disclaiming jurisdiction and transferring the case to the other.

We first point out that the first round of "ping pong" that petitioner anticipates is one that it is currently seeking—retransfer from the Ninth Circuit to

the Claims Court. Should petitioner succeed in persuading the Ninth Circuit to retransfer the case, there is no reason to suppose that the Claims Court will not consider the case at that stage. Moreover, even if the Claims Court continued to refuse to exercise jurisdiction, it is even more speculative to think that it would again transfer the case rather than dismiss it for lack of jurisdiction (at which point direct review would be available in the Federal Circuit). Finally, even if the Claims Court persisted in its view that it lacks jurisdiction *and* again transferred the case to the Ninth Circuit, petitioner would still be able to request certification of that transfer order for immediate review in the Federal Circuit (an avenue which we note petitioner chose not to follow in the first stage of this litigation.) In short, the jurisdictional "ping pong" that petitioner posits is highly speculative, and in the unlikely event that it were to come to pass, petitioner would have ample opportunity for review at that time.

4. There is no merit to petitioner's contention (Pet. 21-25) that certiorari is necessary at this time in order to preserve its contract claims against BPA. If the Ninth Circuit declines to retransfer the case it will decide the merits of the underlying question of whether petitioner's complaint is for declaratory relief under the APA or for breach of contract.[8] Petitioner will thus have received review by an appellate tribunal of the underlying substantive question in this case. If petitioner is dissatisfied with the Ninth Circuit's resolution of that issue, it can seek certiorari at that stage. See *Colt Industries*, 486 U.S. at 817-

[8] Alternatively, if the Ninth Circuit believes that the Claims Court clearly erred in transferring the case, petitioner will be back in the latter court pursuing its contract claims.

818. In short, there is no basis for petitioner's contention that its asserted contract claims will be forever lost if this Court does not grant review at this time.

5. Finally, additional factors unique to this case militate against review. Under the Northwest Power Act, decisions to offer, execute, and implement contracts constitute final agency action that is subject to direct review in the Ninth Circuit. 16 U.S.C. 839f(e). Thus, this case presents the highly unusual situation in which a trial court's transfer order places a case in an appellate court. The Ninth Circuit's consideration of petitioner's retransfer motion will in effect provide review of the Claims Court's decision to transfer the case. Although we agree that a transferee court ordinarily cannot directly review the propriety of a transfer order (Pet. 15-16), petitioner cites no authority in which this principle was applied where the immediate transferee court was an appellate court.[9] Because of the strange posture in which this case arises, it would not be an appropriate vehicle for resolving the question whether interlocutory appeals from Section 1631 transfers are generally permissible.[10]

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[9] The normal practice is to require a motion for retransfer in the trial court to which the action was transferred, with appellate review of that trial court's disposition of the retransfer motion.

[10] An additional factor making this case unusual is the practical problem that the record was physically transferred from the Claims Court to the Ninth Circuit. See Pet. 7-8 n.1; Pet. App. 69a-71a. Although it appears that petitioner's notice of appeal was filed in the Claims Court before the record was docketed in the Ninth Circuit, it is unclear whether the Federal Circuit was in a position to direct the Claims Court to recover the record from the Ninth Circuit; it is even more uncertain that the Federal Circuit would have

Petitioner complains (Pet. 15-16) that it will have no appeal as of right from the Ninth Circuit's resolution of the retransfer motion. This overlooks two factors. First, the Ninth Circuit itself is an appellate court that has considerable expertise in interpreting the Northwest Power Act. See *Public Utility District No. 1* v. *Johnson*, 855 F.2d 647 (1988). Indeed, in that case—where the Ninth Circuit refused to take jurisdiction over a claim that it determined to be in the nature of a contract claim rather than a challenge to final agency action within the meaning of the Act—the Ninth Circuit proved itself responsive to the type of jurisdictional arguments pressed by petitioner in this case. Second, petitioner's argument is inconsistent with this Court's admonition that an order is effectively unreviewable under the collateral order doctrine only if the failure to permit an immediate appeal will "render impossible any review whatsoever." *Firestone Tire & Rubber Co.*, 449 U.S. at 376. As the court of appeals held, the Ninth Circuit's consideration of petitioner's retransfer motion (as well as its consideration of its own jurisdiction) will pro-

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taken that unusual step and that the Ninth Circuit would have agreed. See *Glasstech, Inc.* v. *AB Kyro OY*, 769 F.2d 1574, 1576-1578 (Fed. Cir. 1985); *In re Sosa*, 712 F.2d 1479, 1480 (D.C. Cir. 1983); *Starnes* v. *McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974). Because the notice of appeal was filed prior to the record's docketing in the Ninth Circuit, it appears that the Federal Circuit retained jurisdiction (for the purpose of determining jurisdiction) to decide petioner's appeal. Cf. *Starnes* v. *McGuire*, *supra* (docketing of appeal as well as filing of notice of appeal is necessary to preserve jurisdiction). The practical difficulty remains, however, that the Ninth Circuit now has the case and is considering petitioner's motion to retransfer.

vide effective review for purposes of the collateral order doctrine. See Pet. App. 4a.

In sum, petitioner overstates both the consequences of the Federal Circuit's decision and the extent to which the courts of appeals are in conflict over the inherently fact-specific inquiry whether particular transfer orders are effectively unreviewable. Far from being "an embarrassment to this Court" (Pet. 25), the decision below is correct, and does not call for this Court to resolve this "fact-specific jurisdictional dispute[] that lack[s] national importance." *Colt Industries*, 486 U.S. at 819.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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